(3)

No. 90-542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN MEDICAL ASSOCIATION,

Petitioner,

v.

CHESTER A. WILK, D.C.,
JAMES W. BRYDEN, D.C.,
PATRICIA B. ARTHUR, D.C., and
MICHAEL D. PEDIGO, D.C.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petitioner does not challenge the facts found and affirmed by the courts below, yet the petitioner's "questions presented" are *founded entirely* on purported "facts" that sharply conflict with the findings affirmed below. The petitioner's "questions presented" are therefore not issues in this case. The real questions presented by the Petition are:

1. Whether a horizontal boycott, organized by a trade association with substantial market power, and for the purpose of destroying a competitive profession, is outside the *per se* rule because the conduct is undertaken by a learned profession and purports to be motivated by health, safety, or quality of care concerns.

2. Whether a medical trade association's anticompetitive "ethics" boycott, designed to eliminate the entire competitive profession of chiropractic (licensed in all fifty States), can escape Rule of Reason liability on the basis of a public health, safety, and welfare affirmative defense.

3. Whether the district court abused its discretion, by requiring the AMA to unequivocally advise its members that (i) the AMA's ethics boycott of the chiropractic profession was illegal and is over, and (ii) it is ethical for a medical doctor to associate with chiropractors and their patients, because the AMA had, among other things:

a. organized and financed the decades-old, nationwide, anticompetitive ethics boycott of all chiropractors;

b. purportedly ended the boycott years after the suit was filed but had never so informed its members and had instead told them nothing had changed in the rules regarding chiropractors; and

c. continued to send its members outdated anti-chiropractic literature and at their behest worked with a private, M.D. dominated hospital accreditation association to retain access to all hospital facilities under the control of medical doctors.

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OPINIONS BELOW

Respondents add that: 1) the Seventh Circuit supplemented its *Wilk I* opinion, 719 F.2d 207 (1983), by an opinion denying certain defendants' petition for rehearing, 735 F.2d 217 (1983); and 2) this Court then denied the plaintiff's petition for certiorari in *Wilk I*, 467 U.S. 1210 (1984). Subsequent to remand the district court issued its *Wilk II* opinion, 671 F. Supp. 1465 (1988), and the Seventh Circuit issued its *Wilk II* opinion, 895 F.2d 352 (1989).

STATEMENT OF THE CASE

The petitioner's statement of the case is factually incorrect and incomplete in important respects. S. Ct. R. 15.1. The following is a statement of the facts found and affirmed and the legal rulings of the courts below.

A. History Of The Litigation

This is an antitrust suit brought by respondents pursuant to §1 of the Sherman Act for injunctive relief only. The respondents, four doctors of chiropractic, filed suit against the American Medical Association ("AMA"), and a number of other medical associations[1] alleging they had

[1] The other defendants were the Joint Commission on Accreditation of Hospitals ("JACH"), the American Hospital Association ("AHA"), the American College of Surgeons ("ACS"), the American College of Physicians ("ACP"), the American College of Radiology ("ACR"), the American Academy of Orthopaedic Surgeons ("AAOS"), the American Osteopathic Association ("AOA"), the American Academy of Physical Medicine and Rehabilitation ("AAPMR"), the Illinois State Medical Society ("ISMS"), the Chicago Medical Society ("CMS"), and a number of individuals. The AAPMR, AOA, ISMS, CMS, and AHA settled prior to the close of the second trial. The AAOS, ACR, and ACS settled after the district court (second trial) issued its opinion finding that they had joined in the AMA's illegal conspiracy in violation of the antitrust laws. *Wilk v. AMA*, 1987-2 Trade Cases ¶ 67,689 (N.D. Ill. 1987) (pre-settlement op.).

entered into a nation-wide conspiracy to prevent chiropractors from competing against medical doctors.

Following an eight week trial, a jury returned a verdict in favor of the defendants in January, 1981. The Seventh Circuit reversed the judgment due to substantial trial and jury instruction errors, and remanded for re-trial in 1983. *Wilk I*, 719 F.2d 207 (144a-90a.), *supp. op. denying rehearing*, 735 F.2d 217 (7th Cir. 1983).

The case was re-tried in a bench trial and, in September, 1987, the district court held that the AMA, and a number of other defendants, violated §1 of the Sherman Act. 1987-2 Trade Cases at ¶ 67,689 (pre-settlement op.). After modifying its opinion pursuant to settlement by several defendants, the district court granted the injunctive relief against the AMA now in issue. (136a-43a.)

In February, 1990, the Seventh Circuit affirmed the judgment against the AMA. (1a.) The AMA petitioned for rehearing, which the Seventh Circuit denied on April 27, 1990. (52a.)

In September, 1990, the AMA filed the present Petition seeking review of the Seventh Circuit affirmance. Respondents *agree* that this Court should grant certiorari, *but only* as to the real issues in this case, to clarify critically important law. (See "Questions Presented" *supra*.)

B. The Real Facts Found And Affirmed

1. The AMA And Its Market Power

The AMA is an association of medical physicians. (11a, 74a.) The trial court found and the appellate court affirmed that the AMA's members compete against chiropractors in the market for providing health care services, particularly services for "the treatment of musculoskeletal problems." (73a, 11a.) The lower courts also found that the AMA enjoyed "substantial market power" which, in con-

junction with the barriers to entry in the health care market, allowed the AMA to "adversely affect competition." (11a-12a.)

The opinions below cite numerous examples of how the AMA exercised its market power to exclude chiropractors from the market. (3a-49a, 57a-135a.) One notable example is the AMA's "manipulation" of the JCAH, a private hospital accreditation agency, to enact accreditation standards requiring total exclusion of all chiropractors from all accredited hospitals in the United States and even precluding chiropractic access to hospital laboratory, x-ray, and educational services. (8a, 37a-40a, 43a.)

2. Chiropractic And The AMA's Knowledge Of Its Efficacy

Chiropractors, including the respondents, are health care providers who specialize in the treatment of musculoskeletal ailments, particularly those associated with neuromechanical problems of the musculoskeletal system. (18a, 73a.) Many medical physicians treat these same conditions and are in direct competition with chiropractors. (*Id.*, 121a, 130a.) Despite the AMA's efforts, chiropractic has become licensed in all 50 states, and there are now more than 30,000 chiropractors nationwide. (4a, 34a.)

The AMA knew at an early date that chiropractic was licensed, effective, desired by many millions of consumers, and a competitive threat to medical physicians. As the Seventh Circuit explained:

> [A]ccording to the district court (and this is unchallenged), at the same time [during the period the AMA was conspiring to eliminate chiropractic], there was evidence before the Committee that chiropractic was effective, indeed more effective than the medical profession, in treating certain kinds of problems, such as back injuries. The Committee was also aware, the court found, that some medical physicians believed

chiropractic could be effective and that chiropractors were better trained to deal with musculoskeletal problems than most medical physicians. (18a.)

Numerous studies conducted by, and expert opinions from, *medical physicians* confirm that chiropractors were *at least* as well qualified as, and probably *more* qualified than, medical physicians in treating the most common ailment of mankind: back pain. For example:

• In 1966, *AMA Trustee* Dr. Hendryson, an orthopedic surgeon and Professor of Medicine, reported to the AMA that he had conducted random tests of chiropractic during World War II. He explained that he "attempted objectivity in relation to manipulating techniques of chiropractic evaluated against those ordinary methods that are commonly in use by our own [medical] profession." He found that chiropractic was "impressive" and as effective as and sometimes superior to medical treatment for back pain.

He cited the case of a service man who was "completely incapacitated" while under traditional medical care but upon receiving manipulation "was able to get off the table and say, 'This is the best I've felt in days.' " He reported that chiropractic manipulation of women in their third trimester of pregnancy "has given these women a great deal of physical relief" from back pain. He stated: "I must say quite honestly that there are still aspects of the manipulative therapy itself which impress me and which I feel practicing physicians should be using in the management of low back pain." (PX 241.)

Dr. Henryson requested a follow-up study, but the AMA Committee on Quackery suppressed his report claiming it might be "misconstrued." (PX 240.)

• In 1967, Dr. Wilson, chairman of the AMA's Section on Orthopaedic Surgery and later President of a co-conspirator, the American Academy of Orthopaedic Surgeons,

explained in the *Journal of the American Medical Association* that medical doctors were essentially ignorant of the causes or corrections of low back problems:

> The teaching in our medical schools of the etiology, natural history, and treatment of low back pain is inconsistent and less than minimal. The student may or may not have heard a lecture on the subject, he may have been instructed solely by a neurosurgeon, or the curriculum committee may have decided that clinical lectures are "out" and more basic sciences "in." The orthopedic surgeon, to his distress, often sees his hours in the curriculum pared to the barest minimum.
>
> A survey of orthopedic residents graduating from an approved program in a large urban area disclosed several alarming deficiencies in their training. They know very little about the natural history of degenerative disc disease in the lower part of the spine. . . . They were too unsure of the technique of careful lumbar spine examination to include a search for early stages of neurologic deficit. . . . They knew least when to use a particular surgical procedure.
>
> At the postgraduate level, symposia and courses concerning the cause and treatment of low back and sciatic pain are often ineffective because of prejudices and controversy.
>
> These inconsistencies spawn disastrous sequelae:
>
> (1) patients operated upon after inadequate evaluation;
> (2) reliance by physicians on poor quality x-ray films;
> (3) surgery done only because of an abnormality in a myelogram without reference to plain films of the lower spine;
> (4) exploratory surgery upon the lower back done without sufficient clinical basis; . . .
> (8) extensive removal of posterior vertebral elements by neurosurgeons, making stabilization of the lower portion of the spine technically difficult if not impossible. (PX 289a.)

• In 1967, Dr. Rudd, M.D., published "Medical Aspects of Manipulation Therapy: Passive Stretching" in the *Military Medicine Journal*. He explained that traditional medicine had long recognized that "there is a place for manipulative therapy"—provided that the manipulation was done by medical physicians and not chiropractors. He reported, however, that he had observed independent chiropractors utilize these maneuvers with great success, and he recommended that medical schools begin teaching these same manipulative techniques. (PX 184.)

• In 1971, Dr. Martin, M.D., the medical director of the Oregon Workmen's Compensation Board, published "A Study of Time Loss Back Claims." He concluded that chiropractors were twice as effective as medical physicians in returning the injured to work:

> Examining the forms of conservative therapy the majority received, it is interesting to note the results of those treated by chiropractic physicians. A total of twenty-nine claimants were treated by no other physician than a chiropractor. 82% of these workmen resumed work after one week of time loss. Their claims were closed without a disability award. Examining claims treated by the M.D., in which the diagnosis seems comparable to the type of injury suffered by the workmen treated by the chiropractor, 41% of these workmen resumed work after one week of time loss. (PX 193.)

• In 1971, Mr. Oberfield of the Sinai School of Medicine published an article about the favorable experiences that medical physicians had with chiropractic. (PX 1471.) A member of the AMA's Committee on Quackery responded by (1) sternly criticizing Mr. Oberfield for favorably reporting on the "cult of chiropractic," and (2) sending a copy of the criticism to Mr. Oberfield's colleagues. (PX 1472.)

• In 1972, Dr. Healy, M.D., implored the medical profession to recognize the efficacy and possible superiority of

chiropractic and to stop "ignor[ing] what is happening." Dr. Healy protested that he could not agree with the AMA that chiropractors were "quacks." He recited instances of patients who were helped by chiropractors and explained how "A colleague at medical school told me of what his chiropractor father could do for tension headache and ankle sprains." He stated:

> Then I met [a chiropractor.] He didn't look like a charlatan. He looked like me. . . . A thoughtful labor leader pointed out to me that most people don't care what the chiropractic theory is, . . . they know that doctors of chiropractic help their backaches and muscle pains. . . . They offer something more where we fail. (PX 1476.)

• In 1974, five medical physicians from the University of Utah's College of Medicine published a study entitled "Manipulating the Patient" in the prestigious British medical journal, *Lancet*. Their study concluded:

> the intervention of a chiropractor in problems around the neck was at least as effective as that of a physician, in terms of restoring a patient's function and satisfying the patient. . . . As the storm clouds darken in the clash between organized medicine and chiropractic, it is imperative that definitive data replace impassioned statements. (PX 192.)

• In 1975, Dr. Wolf, M.D., published a study of 629 workmen's compensation cases in California. This study showed that doctors of chiropractic were twice as effective as medical physicians in returning injured employees to work:

> Average lost time per employee—32 days in the M.D.-treated group, 15.6 days in the chiropractor-treated group. Employees reporting no lost time—21% in the M.D.-treated group, 47.9% in the chiropractor-treated group. Employees reporting lost time in excess of 60 days—13.2% in the M.D.-treated group, 6.7% in the chiropractor-treated group. (PX 194.)

• In 1979, a Royal Commission of Inquiry On Chiropractic in New Zealand published an in-depth study on chiropractic. Soon after it issued, the AMA was aware that this report stated:

> 34. The Commission has found it established beyond any reasonable degree of doubt that chiropractors have a more thorough training in spinal mechanics and spinal manual therapy than any other health professional. It would therefore be astonishing to contemplate that a chiropractor, in those areas of expertise, should be subject to the directions of a medical practitioner *who is largely ignorant of those matters simply because he has had no training in them. . . .* (PX 1829, emphasis added.)

• In 1982, the AMA's Family Medical Guide reported that pressure on the nerves in the neck may result in a diseased bladder. (PX 7081.) An AMA orthopedic surgeon witness (Dr. Stevens) admitted that "the ultimate solution to the problem" of recurrent bladder infections is "to remove the pressure on the nerve in the neck." (Tr. 2134.)

• In 1987, Dr. Frietag, M.D., Ph.D. in Anatomy, and Professor of Orthopaedic Surgery at Northwestern Medical School, testified regarding his substantial experience with chiropractors who had been recently added to the staff of a Chicago hospital. He explained that the average hospital stay of orthopedic patients was *cut in half* when they received in-hospital chiropractic care. (85a; Tr. 812.)

• At trial, Dr. Mennell, M.D., world renowned orthopedist, and Professor of Physiatry, testified: 1) the musculoskeletal system receives "scant attention" in American medical schools; 2) joint dysfunction in the musculoskeletal system may cause organic dysfunction and pain that can and should be cured by manipulation; 3) he is aware of reports that, for patients with non-life threatening injuries, chiropractic treatment can cure and return the patients to work quicker and at less cost than medical treatment; 4) chiropractic

is safe; 5) chiropractors and medical doctors see "the same patient groups with the same subjective symptoms"; and 6) at some point in their lives 80% of all people experience musculoskeletal pain susceptible to chiropractic care. (5a; Tr. 11, 34, 35, 41, 59.)

• At trial, "the AMA lawyers and Dr. Alan R. Nelson [, then] Chairman of the AMA's Board of Trustees, [recognized] chiropractic as a valid health care service." (67a.) "Even the defendants' economic expert, Mr. Lynk, assumed that chiropractors outperformed medical physicians in the treatment of certain conditions, and he believed that was a reasonable assumption."[2] (85a.)

• Finally, in 1990 the *British Medical Journal* published the results of an extensive, controlled, prospective study by British medical physicians, entitled: "Low Back Pain of Mechanical Origin: Randomized Comparison of Chiro-

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[2] The AMA's contention that the trial court found chiropractic or the plaintiffs to be unscientific, is malicious and untrue. The trial court held that, in order to conclusively determine whether chiropractic is scientific, one would have to conduct a controlled study of a type that had not yet been performed. (84a-85a.) On the basis of voluminous additional evidence, however, the court found that chiropractic is therapeutic. The court even noted, "most defense witnesses agree that chiropractic treatment is therapeutic" (84a), and as noted above, the Chairman of the AMA testified that chiropractic services "includes some forms of manipulation that do have a scientific basis." (83a; *see also* 67a-68a.) Dr. Epps, a member of the AMA Judicial Council, also admitted that some chiropractic manipulation has a scientific basis. (83a-84a.) Dr. Dickey, another AMA witness, testified to the same effect. (E.g., Tr. 2982-83.) Thus, as the appellate court held, "the district court did not agree with the AMA that the plaintiffs were 'unscientific' practitioners." (21a.) In fact, despite the AMA's misleading statements to the contrary, the Seventh Circuit affirmed the finding that "no one involved in the case, including the plaintiffs, believed that chiropractic treatment should be used for treatment of diseases such as cancer, diabetes, heart disease, high blood pressure, and infections." (22a.)

practic and Hospital Outpatient Treatment," *British Medical Journal* (June 22, 1990).[3] The study states:

> Objective—To compare chiropractic and hospital outpatient treatment for managing low back pain of mechanical origin.
>
> Design—Randomized controlled trial. Allocation to chiropractic or hospital management by minimization to establish groups for analysis of results according to initial referral clinic, length of current episode, history, and severity of back pain. Patients were followed up for up to two years.
>
> Setting—Chiropractic and hospital outpatient clinics in 11 centers.
>
> Patients—741 Patients aged 18-65 who had no contraindications to manipulation and who had not been treated within the past month. . . .
>
> Results—Chiropractic treatment was more effective than hospital outpatient management, mainly for patients with chronic or severe back pain. *A benefit of about 7% points on the Oswestry scale was seen at two years. The benefit of chiropractic treatment became more evident throughout the follow up period. Secondary outcome measures also showed that chiropractic was more beneficial.*
>
> Conclusions—For patients with low back pain in whom manipulation is not contraindicated *chiroprac-*

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[3] Respondents request judicial notice of this recent article from a world renowned *medical* journal. The article demonstrates how the elimination of chiropractic could *never* have been either objectively reasonable or in furtherance of public welfare. The article is the type of nonrecord scientific report that the Court has judicially noticed to determine the impact of laws on public welfare. Advisory Committee Note to Fed. R. Evid. 201(b). *See Roe v. Wade*, 410 U.S. 113, 160 n. 59 & 60 (1973); *Muller v. Oregon*, 208 U.S. 412, 421 (1908). The article reports the type of "controlled" study the district court suggested should be undertaken. (84a-85a.)

> *tic almost certainly confers worthwhile, long term benefit in comparison with hospital outpatient management.* The benefit is seen mainly in those with chronic or severe pain. Introducing chiropractic into NHS practice should be considered. (Emphasis added.)

Under "Economic Implications" the authors concluded:

> The potential economic, resource, and policy implications of our results are extensive. The average cost of chiropractic investigation and treatment at 1988-9 prices was $273.90 per patient compared with $184.26 for hospital treatment. Some 300,000 patients are referred to hospital for back pain each year, "of whom about 72,000 would be expected to have no contraindications to manipulation." If all these patients were referred for chiropractic instead of hospital treatment the annual cost would be about $6,640,000. *Our results suggest that there might be a reduction of some 290,000 days in sickness absence during two years,* saving about $21,580,000 in output and $4,814,000 in social security payments. . . . There is, therefore, economic support for use of chiropractic in low back pain, *though the obvious clinical improvement in pain and disability attributable to chiropractic treatment is in itself an adequate reason for considering the use of chiropractic.* (Emphasis added.)

As explained below, joint studies such as this recent British medical study were proscribed in this country as unethical by the AMA.

3. The AMA Conspired To "Contain And Eliminate" The Entire Licensed Profession Of Chiropractic

From 1963 until at least 1980 (four years *after* this litigation began) the AMA engaged in a nationwide conspiracy that had as its explicit goal, "the containment of chiropractic and ultimately, the elimination of chiropractic." (7a, 19a.) In reciting only a small number of the AMA's exten-

sive activities in furtherance of the conspiracy, the Court of Appeals explained:

> In 1963, the AMA formed its Committee on Quackery ("Committee"). The Committee worked diligently to eliminate chiropractic. A primary method to achieve this goal was to make it unethical for medical physicians to professionally associate with chiropractors. Under former [AMA] Principle [of Medical Ethics] 3, it was unethical for medical physicians to associate with 'unscientific practitioners.' In 1966, the AMA's House of Delegates passed a resolution labelling chiropractic as an unscientific cult.
>
> The district court found the AMA's purpose in all of this was to prevent medical physicians from referring patients to chiropractors and from accepting referrals of patients from chiropractors, so as to prevent chiropractors from obtaining access to hospital diagnostic services and membership on hospital medical staffs, to prevent medical physicians from teaching at chiropractic colleges or engaging in any joint research, and to prevent any cooperation between the two groups in the delivery of health care services. Despite the Committee's efforts, chiropractic ultimately became licensed in all 50 states. . . .
>
> In 1980 [*years after this lawsuit began*], the AMA revised its Principles of Medical Ethics, eliminating Principle 3. With this gesture, the district court found, the AMA's boycott ended.[4] (3a-4a; emph. added.)

The Seventh Circuit also affirmed the district court's findings that the AMA's goal was "keeping chiropractors out of hospitals" and "destroy[ing] a competitor, namely, chiropractors." (14a.) The Seventh Circuit noted the district court's doubt that this was done out of a concern

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[4] In fact, the district court made *extensive findings* that, though relaxed, at least a large portion of the boycott, which the AMA started, continued through the date of trial in the form of the ACR, AAOS, ACS, and others. (117a-134a; *Wilk*, 1987-2 Trade Cases at ¶ 67,689.)

for "scientific method in patient care" and agreed that "there are too many references in the record to chiropractors as competitors to ignore."[5] (17a-18a, 85a.)

Nevertheless, the courts below found that there was sufficient evidence of concern for patient welfare underlying the AMA's intent to destroy all of its chiropractic competitors. Both courts agreed, however, that this purported concern for patient welfare was "objectively unreasonable" and closed minded. (17a-18a.)

4. The AMA's Unreasonable Restraint Of Trade And Need For An Injunction

The district court found that the AMA and its Committee on Quackery had succeeded in impeding the growth of chiropractic (74a-75a); raising chiropractors' costs; interfering with consumers' freedom of choice; preventing medical physicians from referring patients to chiropractors; preventing chiropractors from improving their professional education (75a-76a, 127a-28a); reducing demand for chiropractic services; adversely affecting income of chiropractors; and injuring the professional reputation of chiropractors. (77a-79a.) The Seventh Circuit affirmed these findings. (3a-4a, 5a, 11a-13a, 16a, 20a-22a.)

Both lower courts held that these effects were unreasonably anticompetitive and violative of the Rule of Reason. (12a-16a, 73a-77a.) Both courts also held that: (1) even though the AMA boycott ended in 1980 (four years *after* this case was filed), the boycott continued to have lingering anticompetitive effects through the date of trial, and (2) without an injunction, there was a dangerous likelihood that the AMA would repeat its illegal assault on chiro-

[5] For example, one member of the Committee on Quackery stated in a speech to medical physicians, "it would be well to get across the point [to young physicians] that the doctor of chiropractic is stealing [the young medical physician's] money." (73a-74a.)

practic. (26a-29a, 30a-32a, 93a-98a, 140a-41a.) The Seventh Circuit affirmed the district court's order requiring the AMA to: (1) inform its members that the boycott was unlawful and over, and (2) amend its ethics rules to state the AMA's present position (which the AMA stated in court but had never told its members): that a medical doctor is ethically free to professionally associate with a chiropractor provided it is believed to be in the best interest of the patient. (23a-35a, 142a-43a, 137a-38a.)

While unrelated to the AMA's questions presented, the AMA discusses and overstates the effect of settlements in other chiropractic lawsuits. Consider these settlements in context.

In 1982, two years *after* the boycott supposedly ended and six years *after* this litigation began, the President of the AMA, Dr. Cloud, publicly denied that the 1980 ethics code had changed the AMA's position on chiropractic. (69a.) In 1985, when the Illinois State Medical Society settled with respondents by publicly explaining that it is ethical to associate with chiropractors, the AMA responded with a four column headline in the AMA News stating: "ILLINOIS ACTION ON CHIROPRACTIC CONDEMNED." (PX 7189.) At trial, Dr. Meany, a longstanding AMA member and Chancellor of the co-conspirator American College of Radiology, admitted that even *he did not know* of *any* change in the AMA's ban on associations with chiropractors. (95a-96a.) The evidence was clear that the AMA members did not and could not know the boycott was purportedly over. (94a-98a.)

The settlements the AMA refers to do not state that the boycott was illegal or that it was over. (29a, 69a-70a, 96a-97a.) Indeed, they do not state that it is ethical to associate with chiropractors when deemed to be in the patient's best interest. (*Id.*) They cannot be enforced by the respondents at all, and not even by the signatories except in New York, Pennsylvania, and Iowa. (96a.) Final-

ly, these settlements do not preclude the wide array of anticompetitive devices the AMA aimed at chiropractors. (29a, 69a-70a, 96a-97a.) For these and other reasons, both lower courts rejected the AMA's arguments based on these settlements. (69a-70a, 96a-97a, 28a.)

REASONS FOR GRANTING A WRIT

Respondents believe issuance of a writ is appropriate, but not on the questions presented by the AMA. Below respondents explain why the petitioner's questions are not issues in this case and why the issues framed by respondents should be reviewed by this Court.

I. The AMA's Petition Is Based On Misstated Facts And Law

A. The AMA's Boycott Was Anticompetitive

According to the AMA, its nationwide boycott of all chiropractors did not affect price or output in any market, only indirectly affected a few individual competitors, and contained expressive components that were procompetitive. (AMA Pet. 1, 3, 12, 14, 15, 18, 20, 21.) As a legal matter, this Court has already explained that, to accept an argument that an effective boycott is procompetitive because of an expressive component—the "hallmark of every effective boycott"—would create "a gaping hole in the fabric of the [antitrust] law." *F.T.C. v. Superior Court Trial Lawyers Assoc.*, 110 S.Ct. 768, 779-80 (1990). More fundamentally, however, the AMA's version of the facts has been twice rejected by the courts below as completely meritless.[6]

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[6] In response to the AMA's contention that its ethical canons were merely "precatory guidelines," the lower courts held that the AMA's ethical canons were inherently coercive since "no honest professional wants to risk the stigma of being labeled unethical." (75a.)

The respondents' economist, Professor Stano, *and* petitioners' economist, Mr. Lynk, agreed, and the lower courts found, that the AMA's boycott activity reduced total demand for chiropractic services, reduced income for all chiropractors, reduced the output of chiropractic services, misallocated economic resources, and caused economic inefficiencies. (11a-15a; 75a-79a; Tr. 1409-22, 1290-1346, 1417-31, 401-02, 441-43.) Similarly, the economists agreed and the lower courts found that the boycott was injurious to chiropractors' professional reputations and that such an injury would further "constitute an anticompetitive effect of the boycott." (79a; Tr. 410-11, 1456-59.) Lastly, the lower courts found the AMA's assertion of procompetitive effects from an expressive component of the boycott to be unfounded and, as its expert admitted, completely speculative at best. (77a, 14a-16a.)

The evidence also showed that chiropractors provide more competition for medical doctors than any other group. (PX 7331 at 17, 36.) Competition between chiropractors and medical doctors is particularly acute with regard to the treatment of low back pain. (PX 8069 at 266; PX 7331 at 36.) Thus, in light of the substantial competition between chiropractors and medical doctors and the AMA's substantial market power (11a-13a, 73a-74a), it is hardly surprising that a conspiracy to destroy the entire chiropractic profession had an adverse affect on competition.

The AMA argues, however, that chiropractic grew despite the boycott and that the illegal conduct therefore could not have had an anticompetitive impact. (Pet. 12, 14, 20.) This argument simply ignores that both lower courts found that chiropractic would have grown even more had it not been for the AMA boycott. (20a-23a, 66a; PX 253.) Indeed, the AMA repeatedly *admitted* that its actions succeeded in retarding the growth chiropractic would have enjoyed in an unfettered market. (66a, 92a; PX 253, 464.) The trial court found that, without the boycott, there would have been more chiropractic schools,

chiropractors, and chiropractic patient visits. (66a, 74a-76a.) In light of these findings, the AMA's contention that its conduct only affected certain individual chiropractors is plainly without merit. (Pet. 3, 15; 20a-23a.)

Respondents also proved through the use of an econometric model that the AMA's boycott reduced total demand for chiropractic services and suppressed the income of all chiropractors. (78a-79a, 94a.) When the AMA boycott was relaxed in 1980, the total market demand for chiropractic services, and chiropractic income, jumped a statistically significant amount (78a-79a; Tr. 458-61; PX 7349), although it remained below the level it would have attained had it not been for the boycott. (78a; PX 7349.) This artificial reduction in demand for chiropractic services is particularly anticompetitive in view of the fact that chiropractic services are lower in price (PX 7333, 7334) and, for some conditions, higher in quality and more effective than medical services. (82a, 85a; Tr. 1109-36, 812.) Indeed, the AMA's economist, after studying the market, believed it *reasonable* to *conclude* that chiropractors outperform medical physicians in the treatment of certain ailments. (85a; Tr. 1414-15; see pp. 3-11 *supra*.)

The foregoing economic facts were proved by the evidence, found by the trial court, and affirmed on appeal. The AMA does not attack these findings as clearly erroneous and, in light of Mr. Lynk's numerous admissions, it clearly cannot. Rather, the AMA simply ignores these facts and claims that the courts below found only minimal anticompetitive effects which, at most, indirectly impacted a few individual chiropractors. This is not in keeping with the requirements of Supreme Court Rule 15.1.

B. The Affect On Chiropractic Was Direct And Intended

The AMA asserts that its conduct had "only incidental, indirect or ancillary effects" on chiropractors. (Pet. i, 3,

15, 16, 20, 21, 22.) This is an astounding contention never before advanced during the fifteen year history of this case. It is factually wrong and legally irrelevant.

First, it is simply not true that the AMA's conduct had only an indirect, incidental, or ancillary impact on chiropractors. The AMA's boycott banned all referrals to or from chiropractors. No diagnostic, radiology, laboratory, or consultative services could be provided to a chiropractor. No hospital privileges could be extended to a chiropractor, and no medical physician could engage in a partnership or group practice with a chiropractor. Even teaching at a chiropractic school was prohibited. While medical physicians were able to use hospital diagnostic equipment free of charge, doctors of chiropractic had to purchase their own. (3a-4a, 63a-64a, 74a-76a, 127a-28a.)

As intended, this ban on association with chiropractors reduced the demand for chiropractic services and made it more expensive for chiropractors to offer health care services. As stated, chiropractors had to buy their own x-ray and laboratory equipment. Even the quality of chiropractic education was suppressed. How these effects could be deemed "indirect," "incidental," or "ancillary" is a mystery. Clearly, these were the specifically intended effects on chiropractic of conduct undertaken "to contain and eliminate the entire chiropractic profession." (74a.)

Furthermore, the cases permitting ancillary restraints of trade involve a *lawful* transaction (such as the sale of a business) and an ancillary restraint (such as a covenant by the seller not to compete against the buyer) that is necessary to allow the lawful transaction to take place. *See N.C.A.A. v. Board of Regents of University of Oklahoma*, 104 S.Ct. 2948, 2960-61 & n. 24 (1984); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981) Here, there was no lawful transaction much less one requiring an ancillary restraint in order to go forward. Here,

the *only* transaction in issue was the AMA's conspiracy to destroy an entire licensed competitive profession.

C. The AMA's Boycott Was Not Legislative

The AMA claims that its efforts to "contain and ultimately eliminate" the entire chiropractic profession were pursued only through legislative activity and the dissemination of public information. (Pet. 5, 6-7.) The AMA neglects to mention that this factual contention was rejected by both the district and appellate courts. (6a-8a, 62a-64a.)

The district court noted that the AMA's Committee on Quackery had engaged in a limited amount of legislative and informational activities. (*Id.*) Accordingly, the district court stated, "I have not relied on any such conduct in reaching any conclusion in this case." (*Id.* n. 2.)

The Seventh Circuit similarly noted that the *Noerr-Pennington* doctrine "does not . . . protect purely private action, not genuinely aimed at prompting governmental action." (6a.) It also held that most of the AMA's conduct was not governmental but was aimed at promulgating "ethical" rules for private associations which required hospitals, physicians, and laboratories to engage in a private boycott of chiropractors, their schools, *and* their patients.[7] (7a-8a.) Far from being part of public legislative debate, the court pointed out that much of the AMA's conduct was intended to be secret and hidden from public view. (8a.) Indeed, by 1962 the AMA had decided that a legislative solution to its antichiropractic goal was not practical. (PX 172.) As a result, a year later the AMA created the Committee on Quackery and resorted to a private commercial boycott found illegal below. (*Id.*)

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[7] "[T]he boycott in *Wilk* [thus] denied to the patients of chiropractors the benefits of the very scientific medicine that the physicians touted so highly." Havighurst, *Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships*, 1984 Duke L.J. 1071, 1103 n.101 (1984).

D. The Courts Below Did Not Rely On Protected Speech To Find Liability

The court of appeals clearly explained that neither it nor the district court relied on any activities protected by the First Amendment:

> The AMA contends that its statements regarding chiropractors were either statements about chiropractic's deficiencies or bona fide opinions in matters of public interest. The district court acknowledged the AMA's claim and, to the extent that the Committee's work regarding influencing legislation on the state and federal levels or in informational activities to inform the public on the nature of chiropractic was involved, it did not consider such conduct in reaching its decision. *Wilk*, 671 F. Supp. at 1473-77. But apart from the protected activity, the district court found substantial evidence of acts aimed at achieving the boycott's goals, not legislative action. *Id.* at 1473-77. (7a.)

Nonetheless, the AMA argues that private conduct that injures competition is protected by the First Amendment if one of its goals is to influence the legislature or inform the public. (Pet. 25-26.) This Court rejected precisely that argument in *Trial Lawyers*, 110 S.Ct. at 776:

> Respondents agreement [to boycott indigent clients] is not outside the coverage of the Sherman Act simply because its objective was the enactment of favorable legislation. . . . It of course remains true that 'no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws,' [citation omitted], even if the defendants' sole purpose is to impose a restraint upon the trade of their competitors [citations omitted]. But in the *Noerr* case the alleged restraint of trade was the intended *consequence* of public action; in this case the boycott was the *means* by which respondents sought to obtain favorable legislation.

Accord Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S.Ct. 1931, 1938 (1988).

II. There Is Nothing Unconstitutional In Finding The AMA's Post-Boycott Anti-Chiropractic Activities Indicated Possible Recurrence Of The Boycott Unless Enjoined

The Seventh Circuit affirmed the district court's consideration of the AMA's *post*-boycott anti-chiropractic activities, including its 1983 efforts to keep chiropractors out of hospitals, in determining whether there was a danger of the illegal acts recurring. (26a-28a.) Having found a substantial likelihood that the illegal acts would recur, and substantial uneradicated anticompetitive effects from the boycott, the district court fashioned relief enjoining recurrence *of the private boycott* and ordering corrective action to eradicate its lingering anticompetitive effects. (87a-98a, 136a-43a.) The district court's order also provides that the injunction should not be construed to "restrict" or "interfere" with the AMA's "right to take positions on any issue, including chiropractic" or its "right to petition . . . on any legislative or regulatory measure. . . ." (142a.)

In these circumstances, there was nothing wrong, much less unconstitutional, in considering the AMA's *post*-boycott activities to determine whether it was likely to reinstitute its illegal and anticompetitive boycott. (26a-28a.) The AMA has cited no case to the contrary.

This Court has held that "[c]ivil suits under the Sherman Act would indeed be idle gestures if the injunction did not run against the continuation or *resumption* of the unlawful practice." *U.S. v. Crescent Amusement Co.*, 323 U.S. 173, 188, 65 S.Ct. 254, 261 (1944). Indeed, having found an illegal conspiracy, the trial court had "the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States v. United States Gypsum Co.*, 340 U.S. 76, 88, 71 S.Ct. 160, 169 (1950). "A trial court's wide discretion in fashioning remedies is not to be exercised to deny relief

altogether by lightly inferring an abandonment of the unlawful activities from a cessation which seems timed to anticipate suit."[8] *U.S. v. Parke, Davis and Co.*, 362 U.S. 29, 48, 80 S.Ct. 503, 514 (1960). *See also U.S. v. Oregon State Medical Soc.*, 343 U.S. 326, 328 (1952). Particularly where, as here, the AMA refuses to recognize the wrongfulness of the illegal activity and continued that activity until sued, "the likelihood of future violations, if not restrained, is clear." *Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.*, 560 F.2d 135, 142 (2d Cir. 1977). (See 29a-30a.)

Thus, the trial court had an absolute *duty* to frame an injunction to prevent any recurrence of the violation which was ongoing when this action was filed. Equally important, the trial court had an absolute *duty* to frame an injunction so as to eradicate the anticompetitive effects from a lengthy, institutionalized, nationwide boycott.

This is particularly so in the current case where the respondent, the AMA, has been convicted twice before of unlawfully restraining competition. See *A.M.A. v. U.S.*, 130 F.2d 233, 248-49 (D.C. Cir. 1942) (*criminal* antitrust violation finding that the AMA has no right to act as a "vigilante"), *aff'd* 317 U.S. 519 (1943); *In re AMA*, 94 F.T.C. 701 (1979) (rejecting many of the same arguments made in the AMA's Petition), *aff'd* 638 F.2d 443 (2d Cir.

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[8] The courts below held that, "In 1977 the AMA began to change its position on chiropractic" but did not end the boycott until at least 1980. *But see* n.4 *supra*. The AMA contends that it ended the boycott in 1977 because of this Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). This suit was filed in October of 1976. The AMA's changes were stimulated by *this* lawsuit—not *Goldfarb*—and there is *not one shred* of evidence to the contrary. (*See, e.g.*, Tr. 1666; n.4 *supra*.) Those changes are "post *Goldfarb*" only in the chronological sense that they are also post World War II. The AMA's fiction that *Goldfarb* gave it religion was described by the court at trial as "a boldface misstatement." (Tr. 2942, 3031-32; for rejection of same AMA argument, see *In re AMA*, *infra*, 94 F.T.C. at 1018-19.)

1980), *aff'd* 455 U.S. 676 (1982). The AMA's private actions prejudice the public as well as its competitors.

III. The True Legal Issues Worthy Of Review

A. There Is No Health, Safety, Or Welfare Affirmative Defense

The AMA claims that it could not have violated the antitrust laws because its purpose was to promote health, safety, and the quality of professional services. (Pet. 3, 15, 17, 18-20, 21-23.) This Court has repeatedly held that anticompetitive conduct cannot be justified on the ground that it was undertaken to improve health, safety, or welfare. Accordingly, the affirmative defense that the AMA claims was unduly burdensome was actually far more lenient than anything to which the AMA was entitled.

In *Wilk I*, the respondent-chiropractors argued that the sole inquiry under the Rule of Reason is whether the challenged conduct unreasonably effects competition. The Seventh Circuit agreed that under the traditional Rule of Reason, the "single standard is whether the challenged agreement is one that promotes competition." (170a-71a.) See *National Soc. of Professional Engineers v. U.S.*, 435 U.S. 679, 691 (1978) ("for sixty years this Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.) Nevertheless, the Seventh Circuit held:

> We hold that the district court and we are free to modify the rule of reason test in a case involving a certain kind of question of ethics for the medical profession. . . . A value independent of the values attributed to unrestrained competition must enter the equation. (175a-77a.)

Accordingly, the Seventh Circuit announced a previously unknown affirmative defense allowing the AMA to escape

liability even though it unreasonably injured competition, if it could prove:

> (1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition. (177a.)

Upon retrial, the courts below both held that the AMA failed to prove elements 2 and 4 of this defense. Specifically, the courts held that the AMA had failed to prove that its negative view of chiropractic was "objectively reasonable" and that its alleged concern for patient care could have been satisfied by less restrictive alternatives. (16a-20a, 81a-87a.) The AMA now claims it should not have been subjected to these tests. The AMA was not entitled to the benefit of the defense at all. The AMA is not a vigilante; and it has not been designated by the people, either legislatively or otherwise, to determine which of its competitors should be allowed to stay in business.

The seminal case is *Professional Engineers*, 435 U.S. at 679. There, a professional association promulgated ethical canons making it unethical for an engineer to negotiate a fee until after he had been selected by the client for the project. The association claimed that this restraint was not unlawful because it was "necessary to the public health, safety and welfare," and because elimination of the canon would "adversely affect the quality of engineering." *Id.* at 685. The issue before this Court was "whether [a professional] canon may be justified . . . because it was adopted by members of a learned profession for the purpose of minimizing the risk [of] . . . inferior work endanger-

ing the public safety." *Id.* at 681. This Court held that the anticompetitive ethical canon could not be justified by health, safety, or welfare concerns:

> The society nonetheless invokes the Rule of Reason, arguing that its restraint on price competition ultimately inures to the public benefit by preventing the production of inferior work and by insuring ethical behavior. As the preceding discussion of the Rule of Reason reveals, this court has never accepted such an argument. . . .
>
> The Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.' *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 248, 71 S.Ct. 240, 249, 95 L.Ed. 239. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad. (*Id.* at 695.)

Further, this Court declined to draw any exceptions for goods or services which, if inferior in quality, would be particularly harmful to public health, safety, and welfare:

> The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy the number of items that may cause serious harm is almost endless—automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. The judiciary cannot indirectly protect the public against

this harm by conferring monopoly privileges on the manufacturers. (*Id.* at 695-96.)

Subsequently, this Court reaffirmed that medical doctors and other professionals are not entitled to a "patient care" or health, safety, and welfare defense. In *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), the Court held that tieing anesthesiology services to hospital services would be *per se* illegal if defendant had market power over the tying product. In doing so this Court stated: "we reject the view . . . that the legality of an arrangement of this kind turns on whether it was adopted for the purpose of improving patient care." 466 U.S. at 25 n. 41.

Similarly, in *Indiana Federation of Dentists v. F.T.C.*, 106 S.Ct. 2009, 2020 (1986), the defendant dental association argued that the F.T.C. had erred in refusing to consider its "non-competitive 'quality of care' justification" for its anticompetitive "ethical policy." This Court rejected the proffered "patient care" defense as amounting to "nothing less than a frontal assault on the basic policy of the Sherman Act" and pointed out that precisely such a defense had been "rejected as illegitimate in the *Society of Professional Engineers*." *Id. Accord*, *Patrick v. Burdget*, 486 S.Ct. 94 (1988) ("This argument, [based on promoting quality of medical care] essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch."); *F.T.C. v. Superior Court Trial Lawyers Association*, 110 S.Ct. 768 (1990) (desire to improve the quality of legal services held no justification for anticompetitive conduct because "the Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.")[9]

[9] The AMA contends *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979), *Hatley v. American Quarter Horse Assoc.*,

(Footnote continued on following page)

The health, safety, and welfare affirmative defense announced by the Seventh Circuit is in sharp conflict with the rulings of this Court. The supposed defense has also been vigorously criticized by legal commentators.[10] The

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[9] *continued*

552 F.2d 646 (5th Cir. 1977), and *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3rd Cir. 1970), support its position that boycotts are lawful when "their primary purpose is to promote safety and product quality." (Pet. 21-23.) These cases support no such argument. In *Neeld*, the court held only that the *per se* rule was inapplicable because the challenged conduct (a rule promoting safety to those playing the game) was not for the purpose of stifling competition. No Rule of Reason violation was found because the alleged restraint was "at most de minimis." 594 F.2d at 1299-1300. In *Hatley*, the court similarly held the *per se* rule was inapplicable because defendants' purpose was to promote the product—quarter horse racing. 552 F.2d at 653-54. As this Court has explained, both *Neeld* and *Hatley* involve professional sports where there could be *no sports product at all* unless uniform rules could be agreed upon by the competitors. *N.C.A.A.*, 104 S.Ct. at 2961 n.24. Finally, in *Tripoli*, the court held only that a vertical restraint preventing a wholesaler from selling a dangerous product to consumers could have no anticompetitive effects if the product faced adequate interbrand competition. 425 F.2d at 938-39. No affirmative defense was even involved in the decision.

[10] For a small sampling of the authorities to this effect, see: Havighurst & King, *Private Credentialing of Health Care Personnel*, 9 Am. J. L. & Med. 263, 289-90 and n. 79 (1984) ("the [*Wilk*] opinion . . . departs sharply from the general rule that compatibility with competition is the controlling question in a restraint of trade case."); Kissam, *Antitrust Boycott Doctrine*, 69 Iowa L. Rev. 1165, 1214-16 (1984) (the patient care defense "would allow professional boycotts to destroy competition in order to enforce some professionals' ideas about high quality of care . . . . [T]he professions neither need nor deserve this special rule."); Havighurst, *Doctors and Hospitals; An Antitrust Perspective on Traditional Relationships*, 1984 Duke L.J. 1071, 1103 n. 101 (1984) (In view of the *Wilk* decision, "The need to reexamine boycott doctrine in light of the crucial importance of decentralized decision-making would seem to be acute."); Note, *Denial of Hospital Admitting Privileges for Non-Physician Providers—A Per Se Antitrust Violation?* 60 Notre Dame L. Rev. 724, 738-43 (1985) (criticizing *Wilk* as contrary to both Supreme Court law and consumer welfare); Comment, *Group Boycotts by Health Care Professionals; Is the Per Se Rule an Appropriate Standard of Antitrust Analysis Under the Sherman Act*,

(Footnote continued on following page)

issue worthy of review by this Court is not whether the AMA was saddled with an unduly burdensome affirmative defense, but whether that affirmative defense exists *at all*. Respondents urge the Court to review that issue. It has potential for both vast mischief and damage to our free market economy and should be renounced. See n.12 *supra*.

B. The *Per Se* Rule Should Have Been Applied

A restraint of trade may be illegal under either the Rule of Reason or the *per se* rule. *Indiana Dentists*, 106 S.Ct. at 2017. If the conduct fits within the *per se* category, there is no need to prove unreasonable effect on competition because the "pernicious effect on competition and lack of any redeeming virtue are conclusively presumed." *Northern Pac. Rwy. Co. v. U.S.*, 356 U.S. 1 (1958).

Since the inception of this case in 1976, the respondents have claimed that the AMA's conduct was *per se* unlawful. Because no court has so ruled, this case has required over a hundred and fifty depositions, two lengthy Rule of Reason trials, five appeals, four petitions for certiorari, and fifteen years of litigation. All this even though there has never been *any* redeeming virtue to the AMA's malicious actions.

The Seventh Circuit recently refused to apply the *per se* rule because this case involves a "learned profession" and medical ethics for which anticompetitive effects are too uncertain to predict. (10a-11a.) Neither reason has merit,

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[10] *continued*

11 U. Dayton L. Rev. 45, 83, 90-91 (1985) ("The standard employed by the *Wilk* court does not place enough emphasis on the competitive considerations mandated by the Supreme Court in rule of reason inquiries and will ultimately, therefore, prove to be unworkable."); Havighurst, *Legal Implications of Health Care Cost Containment*, 36 Case W. Res. L. Rev. 1117 (1986) (*Wilk* "has made a questionable exception for physician boycotts of competitors for patient care motives.").

and the AMA's conduct should have been held *per se* unlawful years ago.

This Court addressed the application of the *per se* rule to a horizontal group boycott in *Northwest Wholesale Stationery, Inc. v. Pacific Stationery and Printing Co.*, 105 S.Ct. 2613, 2619 (1985). There, this Court confirmed that the *per se* rule is applicable to boycotts where the defendant enjoys a "dominant position" in the market or possesses market power and the boycott is intended "to disadvantage competitors by either directly damaging or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." *Id.* at 2619.

Here, the AMA enjoyed substantial market power and organized a horizonal group boycott to coerce (74a-75a) or persuade hospitals, physicians, laboratories, and patients to deny its competitors (i.e., chiropractors) the commercial relationships needed to effectively compete, particularly in the hospital setting. That is the very definition of a *per se* violation.

Nor is there merit to the contention that the *per se* rule does not or should not apply to the medical profession or to canons of medical ethics. In *Jefferson Parish* this Court declined to impose the *per se* rule for lack of evidence of market power over the tying product. In doing so, however, this Court suggested that the *per se* rule would otherwise have applied to medical services, stating that, "with such evidence, the *per se* rule against tying may apply." 466 U.S. at 25 n. 41. Moreover, this Court rejected the argument that the applicability of the *per se* rule "turns on whether [the challenged conduct] was adopted for the purpose of improving patient care." *Id.*

Similarly, in *Indiana Dentists* this Court found the threshold criteria required by *Northwest Wholesalers* for the application of the *per se* rule to be unsatisfied; but it declined to create an exception for boycotts designed

to promote "patient care," despite its assertion by the defendant. 106 S.Ct. at 2020. In addition, the Court explained that the *per se* rule generally applies "to cases in which firms [e.g., the AMA and its members] boycott suppliers [nonconforming hospitals and doctors] or customers [patients] in order to discourage them from doing business with a competitor [chiropractors]." *Id.* at 2018.

Most recently, in *Trial Lawyers*, this Court again declined to create an exception to the *per se* rule for a boycott by members of a learned profession. 110 S.Ct. at 774. The Court applied the *per se* rule even though the boycott was purportedly in the public interest, for the purpose of obtaining "better legal representation for indigent defendants." *Id.*

The failure of the courts below to follow the decisions of this Court and apply a *per se* rule has needlessly extended and complicated this litigation. It has given the AMA the opportunity to endlessly litigate minutiae and the possibility of prevailing where none should have been allowed. The AMA had no justification whatsoever for its direct but private challenge to the fifty state legislatures that licensed chiropractic. Might does not make right in this nation. Millions have suffered and continue to suffer because of the AMA's arrogant assumption of power. A Rule of Reason test (particularly one that allows the non-competitive patient care defense) fails to send a signal to health care practitioners and other professionals that obviously pernicious boycotts to exclude competitors will face *per se* condemnation and prompt liability. (See n. 10 *supra*.) If this Court decides to review this case, respondents respectfully suggest that the proper application of the *per se* rule be considered.

CONCLUSION

The Petition should be granted, provided that review is limited to the real issues in this case as framed above in this Opposition.

Respectfully submitted,

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